1994

Paul J. Roach v. Deanne R. Jex : Brief of Appellee

Utah Court of Appeals

John L. Valentine; Phillip E. Lowry; Howard, Lewis and Petersen; Attorney for Plaintiff/Appellee.
M. Byron Fisher; Bruce D. Reemsnyder; Fabian and Clendenin; Attorneys for Defendant/Appellant.

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

PAUL J. ROACH,	:	940549
Plaintiff Appellee,	:	Case No. ~~94059-CA~~
vs.	:	Oral Argument Priority 15
DEANNE R. JEX,	:	
Defendant Appellant.	:	

BRIEF OF APPELLEE

Appeal from the Ruling of the Fourth District Court,
Utah County, The Honorable Ray M. Harding, Presiding

John L. Valentine (3310) and
Phillip E. Lowry (6603), for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR Appellee

M. Byron Fisher (A1082) and
Bruce D. Reemsnyder (A6021), for:
FABIAN & CLENDENIN
Twelfth Floor
215 South State Street
P.O. Box 510210
Salt Lake City, UT 84151

ATTORNEYS FOR Appellant

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

PAUL J. ROACH,	:	
Plaintiff Appellee,	:	Case No. 94059-CA
vs.	:	Oral Argument Priority 15
DEANNE R. JEX,	:	
Defendant Appellant.	:	

BRIEF OF APPELLEE

Appeal from the Ruling of the Fourth District Court,
Utah County, The Honorable Ray M. Harding, Presiding

John L. Valentine (3310) and
Phillip E. Lowry (6603), for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR Appellee

M. Byron Fisher (A1082) and
Bruce D. Reemsnyder (A6021), for:
FABIAN & CLENDENIN
Twelfth Floor
215 South State Street
P.O. Box 510210
Salt Lake City, UT 84151

ATTORNEYS FOR Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Other Authorities

None.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(2)(k).

STATEMENT OF THE ISSUES

Roach is content with the statement of the issues as presented in Jex's brief, and would only emphasize that her appeal is limited to the issues as framed.

STANDARDS OF REVIEW

Jex is correct in stating that the standard of review for summary judgment is *de novo*: all facts and inferences must be construed in a light most favorable to the nonmoving party. However, this is true only for those issues raised at the district court level. With respect to Jex's first issue, which deals with the form of Roach's supporting memorandum below, she claims that Code of Judicial Administration Rule 4-501 is somehow "mandatory upon the trial court," and that therefore this Court may review that issue *de novo*. Brief of Appellant at 1. This contention is wrong. Jex cites no authority for such an exception to the general rule that "is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal." Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983); see

also Hobleman Motors v. Allred, 685 P.2d 544 (Utah 1984); Strange v. Ostlund, 594 P.2d 877 (Utah 1979).

PERTINENT STATUTORY AUTHORITY

There is no statutory authority relevant to the disposition of this appeal. Issues surrounding Utah Code of J. Admin. Rule 4-501 were not raised below, and thus are not properly before this court.

STATEMENT OF THE CASE

Roach does not dispute Jex's statement of the case.

SUMMARY OF ARGUMENTS

1. Jex never objected below to the form of Roach's memorandum supporting his motion for summary judgment. She has therefore waived her right to raise it on appeal. Furthermore, even if she did not waive this right, all necessary and relevant citations to the record were contained in the memorandum's argument section. The district court thus could properly consider Roach's factual allegations and deem them admitted, as it did.

2. The district court properly ruled that access across Jex's property was reasonably necessary to Roach's enjoyment of his property, and that therefore there was an easement by implication. Roach's leasehold interest and his bridge across the canal did not provide alternate access because they could have been cut off at any time at the discretion of either the canal company or Jex.

3. Jex argues that there was a justiciable issue of fact as to whether the East Bench Canal Company's denial of permission to bridge their canal was reasonable; if it was not reasonable, she argues, then Roach could not claim an easement by necessity because he could bridge the canal. Jex never raised this argument below. Furthermore, her affidavits do not meet the threshold requirements to create a material issue of fact as to the denial's reasonableness. Therefore, the district court was correct in ruling that there was an easement by necessity.

ARGUMENT

I. APPELLANT'S ISSUE NO. I WAS NEVER RAISED BELOW

Jex states as the first issue in her brief, "There was no statement of undisputed material facts in the record upon which summary judgment could be based." This issue was never raised below. Jex admits this failure in her brief, but attempts to circumvent the requirement that issues must have been raised below in order to be preserved for appeal by arguing that Code of Judicial Administration Rule 4-501 is somehow "mandatory upon the trial court." Brief of Appellant at 1. This contention is wrong. Jex cites no authority for such an exception to the general rule that "is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal." Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983)(sufficiency of affidavit under U.R.C.P. 56 cannot be challenged in appellate court when it was not challenged below); see also Hobleman Motors v. Allred, 685 P.2d 544 (Utah 1984); Strange v. Ostlund, 594 P.2d 877 (Utah 1979). Roach is now being asked to respond to an issue that is raised for the first time in Jex's brief, and was never before the trial court. This is impermissible.

Furthermore, even if the issue is properly before this court, Roach must prevail. Utah Rule of Civil Procedure 61 provides that no one is entitled to relief from an order or judgment because of error unless the error is harmful. Huston v. Lewis, 818 P.2d 531 (Utah 1991); see Utah R. Civ. P. 61; Martineau v. Anderson, 636 P.2d 1039, 1042 (Utah 1981); Jensen v. Eames, 519 P.2d 236, 238 (Utah 1974). "An error is harmful when it is of sufficient impact

that there is a 'reasonable likelihood that the error affected the outcome of the proceedings.'" Huston at 533 (quoting State v. Verde, 770 P.2d 116, 120 (Utah 1989)). Moreover, "[i]t is the duty of the Supreme Court to disregard errors unless they are so substantial as to affect the rights of the parties or the likely outcome of the case." Hillyard v. Utah By-Products Co., 263 P.2d 287 (Utah 1957), overruled on other grounds, Harris v. Utah Transit Auth., 671 P.2d 217 (Utah 1983). "Only when there is error both substantial and prejudicial, and when there is a reasonable likelihood that the result would have been different without it, should error be regarded as sufficient to upset a judgment or to grant a new trial." Bowden v. Denver & R.G.W.R.R., 286 P.2d 240 (Utah 1955); see Batt v. State, 503 P.2d 855 (Utah 1972).

If the district court erred, the error was not substantial or prejudicial to Jex, and would not have changed the outcome of the case. Rule 4-501(2)(a) articulates a standard for memoranda. Basically, in order to establish a uniform procedure for submitting memoranda, the Rule requires that memoranda begin with a concise statement of material facts in separate numbered sentences, specifically referring to those portions of the record upon which the movant relies. The fact that Roach generally met those requirements is not disputed in Jex's brief.[1]

[1] Jex has mentioned that a page of Roach's initial memorandum below is missing from the record. The omission is quite obvious--the pagination jumps from page 1 to page 3--and would have been obvious to the district court had its copy also been deficient. Bearing this in mind, Roach moved the district court on October 24, 1994, to correct or modify the record to make it conform to what the district court had before it at the time it ruled. While Jex has deemed this motion "outrageous", it is necessary to correct a simple error, and reflects common sense. In any event, even were the district court not to correct the record, the memorandum was still sufficient to allow the court to rule as it did, since all necessary facts and citations to the record were contained in the "argument" section of the memorandum.

Roach began his memorandum with a section that contained concise statements of material facts. Furthermore, the facts were stated in separate numbered sentences.

The only thing that Roach did not do was immediately refer to the portions of the record on which he relied. However, Roach did refer to the record when reiterating the facts in the "argument" of his memorandum. Specifically, Roach makes appropriate references to the record on pages 6, 7, 8 and 11 of his memorandum, all of which are duplicative of the averments in the complete memorandum (and complementary to the averments in the incomplete memorandum). All relevant facts are raised and supported by these citations.

Thus, Roach substantially complied with the requirements of Rule 4-501(2)(a), and the court did not err in deeming admitted the facts alleged by Roach. If it did so relying on an erroneous format, the fact that the substance of the allegations--reference to the record--was contained in the memorandum rendered that error harmless.

II. THE DISTRICT COURT PROPERLY RULED THAT THERE WAS AN EASEMENT BY IMPLICATION ACROSS JEX'S PARCEL.

Jex contends that one of the necessary elements to an easement by implication--reasonable necessity for enjoyment--is not present.[2] She claims that alternate access was available, either through a leasehold Roach once owned across the land, or through a bridge Roach built across the East Bench Canal Company canal. Neither of these "accesses", however, can defeat the reasonable necessity requirement.

A. If Roach Owned a Leasehold in the Jex Parcel at the Time of Severance, Such Leasehold Would Not Be Reasonable Access to His Other Property.

Jex contends in her brief that Roach owned a leasehold in her property at the time of severance, and that this fact somehow renders his claimed easement not reasonably necessary. By so arguing, Jex essentially is telling Roach that she is happy to accept his rental payments, and that her willingness to do so (combined with his willingness to pay) renders moot his claim to the easement. Roach's being forced to continue, or reaffirm, a lease agreement with Jex does not defeat the reasonable necessity requirement--it underscores it.

Furthermore, Jex seems to argue that the fact that the leasehold existed "at the time of" severance means that the leasehold somehow preceded the severance, and that such precedence

---

[2] There are four elements required to prove an easement by implication: unity of title followed by severance; servitude is apparent, obvious and visible at severance; reasonable necessity to enjoyment; continuous use. By raising only the reasonable necessity for enjoyment requirement, Jex is deemed to have waived any objection to the court's finding that the other three elements existed.

has some impact on the availability of access across her parcel. This contention is wrong and is based on a misunderstanding of the effect of severance. As a matter of law the severance would have had to occur before the leasehold began, otherwise Jex would have had nothing to lease. This would be true even were the leasehold to directly succeed the severance. The leasehold is predicated on the severance, and did not precede it, and thus had no bearing on the pre-severance relationship of the parties. The leasehold therefore has no bearing on the access issue.

B. The Jex Parcel Access is Reasonably Necessary to Enjoyment Because There Is No Access Across the Canal.

Jex contends that the district court could not rule as a matter of law that Roach has been refused permission to bridge the canal because Roach has already bridged the canal. But the presence of a bridge does not mean that the bridge is there with the canal company's permission. It simply means that Roach has built the bridge. As things currently stand, the canal company is within its rights if it demands that Roach tear the bridge down, or otherwise requests that he cease using it.

In contending as she does, Jex confuses the *right* to bridge the canal with the *power* to do so. Suppose I am landlocked by neighbor A and neighbor B. I may have the power to cross A's property as a trespasser (and, perhaps eventually, as a prescriptive easement holder). However, until my way across A's land is somehow legally recognized, I am still landlocked. If I petition a court to recognize an easement by implication across B's land, I will be able to

establish that it is reasonably necessary to cross B's land, despite the fact that I have established a trespassory way across A's land.[3] If I can then prove the other elements of easement by implication, I will prevail.

Here, the canal company is neighbor A, and Jex is neighbor B. She attempts to argue, nonetheless, that Roach does have permission to bridge the canal--in other words, that the passage across A is not trespassory. She does so by arguing that the bridge is evidence of permission, and further argues that one may infer from the presence of other bridges that such permission exists (or is at least obtainable).

Jex had no authority or basis for making such a statement. She is not an officer of the company controlling the canal, nor does she enjoy any particular legal status imbuing her with the power to grant or withhold permission to bridge the canal. Her affidavit is simply a perception or opinion of what the canal company should do so that her interests are satisfied. The affidavit is therefore not only self-serving and of dubious credibility; it is completely irrelevant. It is not evidence (and forms the basis for no remote inference) that other bridges are not also trespassory.

However, there is evidence that Roach's bridge *is* trespassory: the affidavit of J. Merrill Hallam, the president of the company. That evidence was deemed conclusive by the district court:

---

[3] This scenario raises the problem of standing: neighbor B lacks standing to invoke my prescriptive right to cross neighbor A's land, should I have one. My right to bring a lawsuit against A does not preclude my right to bring one against B; otherwise, the two parties could play off against each other *ad infinitum*, each invoking my right to sue the other.

> The fact that [Roach] built a bridge across the canal and has used it for the past year for access to his property is inadequate to refute the affidavit of J. Merrill Hallam that the canal company refuses to allow [Roach] permission to build a bridge across the canal.

In sum, Jex did not produce positive evidence that Roach's use is permissive, and did not refute positive evidence that it is not. There was thus no permission to cross. The district court was empowered, given the lack of evidence supporting Jex's position, to rule that there was no permission, and did not violate applicable standards of proof in doing so. A district court is empowered to rule *as a matter of law* that certain facts are deemed established or admitted under Code of J. Admin. Rule 4-501 (a point addressed earlier), and therefore rule *as a matter of law* that no material dispute exists. If the nonmoving party does not meet the threshold required to create a material issue, then it cannot prevail. Heglar Ranch v. Stillman, 619 P.2d 1390 (Utah 1980). That is what happened here, and the district court's ruling was entirely appropriate.

III. THERE WAS A PROPER EASEMENT BY IMPLICATION: JEX DID NOT RAISE HER CONTRARY ARGUMENT BELOW, AND IN ANY EVENT DID NOT CREATE A JUSTICIABLE ISSUE OF FACT.

Jex contends that the district court could not have ruled that there was an easement by necessity across her land. She states that the canal company was obligated to treat Roach reasonably in its denial of permission to bridge their canal, and that Mr. Hallam's averment in his affidavit that bridges "have resulted in damage to the banks and the canal lining," R. 31, is insufficient to show that the company acted reasonably in denying permission. Jex further argues that the affidavits of her husband and her, in which it is averred that other bridges have

been built across the canal, create a justiciable issue of fact. The theory is that if others have bridged the canal, then it is unreasonable to deny permission for an additional bridge.

This argument was never raised below. In her memorandum below, Jex simply states "The permitting of a bridge is a factual issue to be determined by the Court." R. 43. Nothing was ever mentioned, directly or indirectly, concerning the reasonability of the denial of permission. Jex cannot preserve an issue simply by making a blanket statement that "there are issues of fact"; an oblique reference to an argument at trial is not enough to preserve the claim for appeal. State v. Brown, 856 P.2d 358 (Utah Ct. App. 1993).

Even if this argument were deemed properly raised below, it cannot impugn the district court's ruling. As in her Issue II, Jex is attempting to create issues of fact where none exist. The district court was correct when it concluded that the Hallam affidavit was sufficient to establish the reasonability of the canal company's denial of permission.[4] The Jex affidavits do nothing to change this result. Their relevance is questionable inasmuch as the Jexes do not aver any firsthand knowledge of the circumstances surrounding the erection of other bridges. If they do not have firsthand knowledge, then the affidavits are based on impermissible hearsay. Fundamentally, then, the canal company's reason for denying permission was sensible, and the Jex affidavits, even if admissible, do not change that fact. Jex failed to meet the threshold requirement for creating a justiciable issue of fact, and the district court was correct in ruling as it did.

---

[4] Because Jex never raised the issue of reasonability, the district court did not directly address the issue. However, this court is empowered to affirm a district court on grounds not articulated by that court. Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 894-95 (Utah 1988).

CONCLUSION

In her appeal Jex is attempting to raise issues that were not raised below, and to create disputes where none existed. While Jex is afforded a liberal standard of review in an appeal from a summary judgment, she cannot simply state in an affidavit "There is a dispute" and then prevail. See Williams v. Melby, 699 P.2d 723 (Utah 1985)(affidavit that merely reflects the affidavit's unsubstantiated conclusions and that fails to state evidentiary facts is insufficient to create an issue of fact). A dispute has to be material, Heglar Ranch v. Stillman, 619 P.2d 1390 (Utah 1980), and the district court concluded that there was no material dispute here. The district court should be affirmed.

DATED this 18th day of November, 1994.

JOHN L. VALENTINE and
PHILLIP E. LOWRY, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff-Appellee

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing was mailed to the following, postage prepaid, this 18th day of November, 1994.

M. Byron Fisher, Esq.
Bruce D. Reemsnyder, Esq.
215 So. State, 12th Floor
P. O. Box 510210
Salt Lake City, UT 84151

ATTORNEY

J:\PEL\ROACH.BRF